In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1564

VINCENT J. BERNABEI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 28, 1973, and reaffirmed April 26, 1973.

OPINIONS BELOW

The United States District Court rendered no formal opinion.

The order of the United States Court of Appeals is attached as exhibit, including the denial of the petition for a rehearing.

JURISDICTION

The judgment of the Court of Appeals was entered February 28, 1973 and reaffirmed April 26, 1973. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

Whether the trial Court deprived petitioner of due process of law in refusing to allow defendant to introduce evidence that in the years involved he was suffering from financial difficulties and marital problems, which evidence, if allowed, would have permitted the jury to consider whether the defendant had willfully failed to file income tax returns, or that such failure was due to innocent causes.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, 5th Amendment (deprivation of liberty) (P. 12 infra)

Internal Revenue Code 1954 Section 7203, 26 USC Section 7203.

STATEMENT OF FACTS

The defendant, Vincent J. Bernabei, was charged on an information in four counts filed in the United States District Court for the Northern District of Ohio, Eastern Division, on February 3, 1972, with willfully failing to file income tax returns for the years 1965, 1966, 1967, and 1968, all in violation of Section 7203, Internal Revenue Code of 1954, 26 USC Section 7203. The defendant was tried before a jury, the Honorable Robert Krupansky, D.S., presiding. After four days of trial, appellant was found guilty

on all counts. On May 19, 1972, the appellant was sentenced to one year and $5,000.00 fine on each count, to run consecutively, the total sentence being four years and $20,000.00, four months to be served in jail and the balance probation, provided that the fine is paid within three years. Defendant's motion for a new trial was overruled on June 1, 1972. On June 5, 1972, the defendant filed his notice of appeal.

Vincent Bernabei is forty-six years of age, and during the years here involved was married and the father of five minor children. He resided in Canton, Ohio, and has practiced law there since 1955. In 1968 he was divorced from his wife.

In 1963 and 1964 Bernabei was investigated by Revenue Agents for not filing 1959, 1960, and 1962 returns. The case was settled by his filing late returns, and payment of the taxes.

On August 19, 1968, Internal Revenue Agent George R. Tabeling was assigned to investigate the income tax returns of Vincent Bernabei. He could find no record of returns filed for 1965, 1966, or 1967. On May 15, 1969, he visited Mr. Bernabei at his law office in Canton, Ohio. He introduced himself as a Revenue Agent and showed Mr. Bernabei his credentials and asked him, "Have you filed tax returns?" Mr. Bernabein said, "No." Mr. Tabeling then suspended his investigation and referred the case to the Intelligence Division for potential fraud. Subsequently, the case was investigated by Special Agent Robert Rader. Mr. Rader completed his investigation and report. As a result, an information was filed against Mr. Bernabei in the United States District Court for the Northern District of Ohio, Eastern Division, charging him with willful failure to file income tax returns for 1965, 1966, 1967 and 1968, in violation of Section 7203, Internal Revenue Code of 1954, 26 U.S. Code, Section 7203.

The Government's evidence consisted of taxpayer's cash receipts books for the years 1965, 1966, 1967, and 1968; partially completed and unfiled tax return forms for 1965, 1966; and a paper containing tax information prepared by the defendant for the year 1967, — all of which were given to Internal Revenue investigators voluntarily by defendant. Taxpayer had admitted he had not filed income tax returns for these years, and this fact was corroborated by testimony of an Internal Revenue officer and by official records.

In an attempt to corroborate the income information furnished by the taxpayer, the Government presented in trial twelve witnesses' testimony, which indicated gross fees paid to the defendant of $1,873.00 in 1965; $3,944.52 in 1966; $2,724.00 in 1967; $2,558.00 in 1968. The information alleged gross income of $30,879.00 in 1965; $25,208.00 in 1966; $30,112.00 in 1967; $31,845.00 in 1968. Taxpayer's incomplete records for 1965, 1966, and 1967 showed costs of business in salaries and office expenses of $7,965.99, $6,779.70 and $4,337.00 for the years 1965, 1966, and 1967 respectively. There was no evidence of expenses for the year 1968.

Bernabei's records of receipts were substantially in agreement with his unfiled tax returns for 1965 and 1966, and his incompleted tax information records for 1967. All four years showed gross receipts per Bernabei's records in amounts ranging from approximately $23,000.00 to $29,500.00. In the trial Revenue Agent Tabeling testified that when Mr. Bernabei was asked why he did not file, he said he did not have enough money to pay the taxes.

Revenue Agent Theodore Pergins, who had conducted a prior examination of the defendant relative to his tax returns for the years 1959, 1960, and 1962, testified that in his final report (no criminal prosecution) he made the statement that the taxpayers (Mr. and Mrs. Bernabei) were

"heavily in debt, as they have borrowed money from various finance companies, and so forth".

Defendant's motion for acquittal when the prosecution rested was denied. When the defendant was testifying, the Court refused to allow him to testify concerning his financial and marital difficulties, as an explanation that his failure to file was involuntary and not willfull. The defense proffered his testimony that this was the reason for his failure to file tax returns and also proffered supporting bank statements.

REASONS FOR GRANTING WRIT

The question presented in this proceeding is important since it relates to the question of whether the defendant was given a fair trial because of the trial Court's refusal to permit him to present his defense. There is a conflict in the District Courts and the Circuit Courts as to what constitutes willfullness in the misdemeanor offense of willful failure to file a tax return. In *U.S.* v. *Spies,* 317 U.S. 492, the Supreme Court held that the financial condition of a taxpayer might well have some bearing on the willfullness and intent, especially in an offense of willfull failure to pay. In *U.S.* v. *Murdock,* 290 U.S. 389, the Supreme Court indicated that willfullness meant something done with a bad purpose or an evil motive. In *Yarborough* v. *U.S.,* 230 Fed. 2nd 56 (4th Circuit), cert. denied 351 U.S. 696, the Court approved instructions to the jury that the testimony that the defendant did not have sufficient cash to pay the tax was evidence that the jury had a right to consider along with all the other facts. To the contrary, in *U.S.* v. *Haseltine,* 419 Fed. 2nd 579 (9th Circuit), it held that the trial Court's rejection of evidence relating to the defendant's inability to pay taxes was proper.

The taxpayer in this present case was, during the years involved, driven to a point of distraction not only by his financial worries but also by the disruption of his home caused, among other equally distressing things, by his wife leaving several times. He was aware that, if he did file tax returns and did not pay the tax, the Internal Revenue Service under its collection power could seize his assets and destroy his ability to continue in the law practice.

It is well established that proof of criminal intent can be shown by surrounding circumstances and collateral facts, and that intent can be inferred from all of these factors. Certainly, to give the defendant a fair hearing, he should likewise be able to establish all surrounding conditions and circumstances from which an inference of innocence might be drawn.

In this present proceeding the jury was allowed to see only one side of the coin — that presented by the prosecution. The defendant was prevented by the Court's ruling from explaining and showing to the jury the circumstances on which he relied to prove that his omissions were not willfull and were due to innocent cause. Uuder the Trial Court's ruling the jury never had an opportunity to decide whether taxpayer had an innocent cause for not filing.

In view of the divergence of the Circuit Courts and the importance of establishing rules for a fair trial in this type of case, it is submitted that this Writ of Certiorari should be granted.

CONCLUSION

For the reasons stated, the petitioner respectfully prays that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

No. 72-1866

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VINCENT J. BERNABEI,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

APPEAL from United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed February 28, 1973.

Before: EDWARDS and PECK, Circuit Judges, and WILSON, District Judge.*

PER CURIAM. Defendant-appellant, who is an attorney, perfected this appeal from his conviction for failure to file federal income tax returns for the year 1965 through 1968. On this appeal appellant contends principally that the trial judge erred in refusing to permit him to introduce evidence of marital and financial difficulties, as to which proffers were made. It is his contention that in failing

* Honorable Frank W. Wilson, Chief Judge of the United States District Court for the Eastern District of Tennessee, sitting by designation.

to file the returns in question he "had no evil motive . . ., but due to pressures and stress, neglected, without any criminal intent, to file his returns when due." It is here concluded that evidence of financial and domestic problems are not relevant to the issue of willfulness as the term is used in the statute under which appellant was charged and in the indictment, and that the evidence was properly excluded.

It is further concluded that the other contentions presented on appeal are without merit, and the judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-1866

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

VINCENT J. BERNABEI,
Defendant-Appellant.

Before: EDWARDS, PECK, Circuit Judges and WILSON, District Judge.

JUDGMENT

(Filed February 28, 1973.)

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

NO. 72-1866

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VINCENT J. BERNABEI,
Defendant-Appellant

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

ORDER

(Filed April 26, 1973)

Before: EDWARDS and PECK, Circuit Judges, and WILSON, District Judge.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

CONSTITUTIONAL PROVISIONS

Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

RELEVANT SECTIONS OF THE INTERNAL REVENUE CODE

Section 7203:

"WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION OR PAY TAX.

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more that $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.